

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

EDWARD JOHNSTON,

Civil No. 07-6302-AA
OPINION AND ORDER

Plaintiff,

vs.

CITY OF TOLEDO, PETE WALL,
SHARON BRANSTITTER and the
ESTATE OF SHARON BRANSTITTER,
JAMES RUGGERI, DONALD DENNISON,
WILL EWING, MARK FANDREY and
DOES 1-10,

Defendants.

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Ruggeri and Mark Fandrey

AIKEN, Judge:

Defendants City of Toledo, Estate of Sharon Branstitter, James Ruggeri and Mark Fandrey ("defendants") filed a motion for summary judgment asserting that they are entitled to judgment as a matter of law on plaintiff's claims. Defendants' motion is granted and this case is dismissed.

BACKGROUND

Plaintiff brings this action asserting three claims against defendant pursuant to 42 U.S.C. § 1983 and one state law claim. Plaintiff first alleges denial of his due process rights under the Fourteenth Amendment, next a violation of his First Amendment right to free speech and assembly, and finally a Monell claim against defendant City of Toledo for an unconstitutional policy, practice, or custom under the Fourteenth Amendment. Plaintiff also alleges a state law claim for intentional infliction of emotional distress.

Plaintiff qualified for and was receiving Social Security disability benefits. Based on an anonymous phone call to the Social Security Administration (SSA) investigative office, the Cooperative Disability Investigations Unit (CDIU) conducted an investigation and completed a report recommending termination of plaintiff's benefits. Plaintiff did not know the identity of the caller or the reason for the call. On June 6, 2006, plaintiff's benefits were terminated based on the CDIU's report. The

decision to terminate plaintiff's benefits was based in part on witness statements that included plaintiff's neighbors and former employer, and others who did not work for the City of Toledo. City of Toledo employees, however, also cooperated with the CDIU investigation and provided information about plaintiff.

Plaintiff appealed the termination of his disability benefits and requested a hearing. A hearing was held and plaintiff produced evidence that he remained unable to work due to leg pain, a spinal condition and lung disease. The hearings officer concluded that plaintiff had not experienced medical improvement and reinstated plaintiff's disability benefits.

Plaintiff alleges that the six-month cessation of disability benefits was due to defendants' "policy, practice or procedure" to "make my life a living hell." Declaration of Edward Johnston, p. 3, ¶ 2. Plaintiff alleges that defendants sought to "destroy his family" and "take away his disability benefits" if he continued "speaking out on political issues." Id. Plaintiff alleges that defendants made statements during City of Toledo Council meetings that plaintiff had better "watch his back as a result of [plaintiff's] political actions" and that plaintiff's disability benefits were "in jeopardy." Id. As a result of defendants' allegedly threatening statements, plaintiff asserts that he was "forced to curtail many political activities," including taping City of Toledo Council meetings, not running for

mayor of Toledo and halting his "publishing activities." Id.

STANDARDS

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Substantive law on an issue determines the materiality of a fact. T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assoc., 809 F.2d 626, 630 (9th Cir. 1987). Whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party determines the authenticity of a dispute. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. Id. at 324.

Special rules of construction apply when evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the

underlying facts must be viewed in the light most favorable to the nonmoving party. T.W. Electrical, 809 F.2d at 630.

DISCUSSION

1. Individual Defendants Not Served

Defendants first request that the five individual defendants not served (including defendant "Does 1-10") be dismissed. Plaintiff does not object to this request in his Memo in Opposition to Defendants' Motion for Summary Judgment. Plaintiff filed his Complaint on October 19, 2007. Those four defendants properly served filed an Answer on January 25, 2008. Plaintiff has not requested to extend the time for service and nor has he taken any action to serve the remaining five defendants named in the Complaint (including any Doe defendants). The court has no jurisdiction over these parties, therefore, they are dismissed. See Fed. R. Civ. P. 4(m).

2. Plaintiff's Due Process Claim

____Plaintiff appears to allege that he was denied due process by the defendants when his disability benefits were terminated. Plaintiff's claim is denied. It is undisputed that plaintiff's disability benefits were terminated following an independent investigation conducted by the CDIU, an agency of the SSA. I find no evidence that the individually named defendants were involved in that decision, nor that they had the power to impact the decision to terminate plaintiff's benefits. Plaintiff argues

that the individual defendants filed false reports which led to the CDIU investigation. Plaintiff provides no evidence in support of this claim other than his bare assertion in the Complaint.

Moreover, a procedural due process claim requires plaintiff to prove: (1) that he had a protectable liberty or property interest; and (2) he experienced a denial of adequate procedural protections in the deprivation of that liberty or property interest. Foss v. National Marine Fisheries Serv., 161 F.3d 584, 588 (9th Cir. 1998). Clearly, plaintiff has a property interest in his disability benefits. Mathews v. Eldridge, 424 U.S. 319, 332 (1976). However, regarding the second element, the Supreme Court in Mathews held that "an evidentiary hearing is not required prior to the termination of disability benefits." Id. at 349. Disability benefits can be terminated after only some minimal interaction between the claimant and the government regarding the proposed termination, as long as an appropriate evidentiary hearing comes later. That was exactly the process provided here. Plaintiff received notification prior to the termination of his benefits. Plaintiff appealed the termination and requested a hearing. Plaintiff then produced evidence at the hearing before a SSA hearings officer whereby the officer concluded that plaintiff had not experienced medical improvement and reinstated his benefits. I find no violation of plaintiff's

due process rights even assuming that plaintiff could show that some action of defendants was the cause of his alleged due process loss.

3. Plaintiff's First Amendment Claim

Plaintiff's claim under the First Amendment is not clear. He appears to allege that defendants violated his First Amendment rights to free speech and assembly by filing reports to deprive plaintiff of his disability benefits in retaliation for plaintiff's actions as a political activist. To state a claim for First Amendment violation, plaintiff must provide evidence showing that defendants' actions deterred or chilled his political speech. I find no evidence in the record supporting plaintiff's allegation. Plaintiff alleges only that one of the defendants reported him to SSA. However, reporting plaintiff is not sufficient, plaintiff must also prove that the defendants' desire to cause the "chilling" effect was a "but-for" cause of defendants' actions. Skoog v. County of Clackamas, 469 F.3d 1221, 1232 (9th Cir. 2006). First, I find no evidence beyond plaintiff's bare allegation in his complaint that any of the moving defendants even reported him to the SSA; second, even assuming defendants did report plaintiff, I find no evidence, nor has plaintiff produced any evidence, that defendants' intent to deter plaintiff's speech was a "substantial or motivating" factor in defendants' conduct. This claim is dismissed.

4. Plaintiff's Monell Claim

_____To establish municipal liability, plaintiff must show: (1) he possessed a constitutional right of which he was deprived; (2) the municipality has a policy; (3) the policy amounts to a deliberate indifference to plaintiff's constitutional rights; and (4) the policy is the moving force behind the constitutional violation. Monell v. Dept. of Soc. Servs., 436 U.S. 658, 694 (1978).

Plaintiff here fails to identify any unconstitutional policy or custom that was the cause of his injury. Plaintiff asserts only that the City of Toledo had a policy and the individual defendants deprived plaintiff of his constitutional rights pursuant to this policy. If not relying upon a specific written policy, plaintiff must show a longstanding practice or custom which constitutes the standard operating procedures of the City of Toledo. Plaintiff presents only conclusory allegations, without evidence of any policy, custom or practice. These allegations are insufficient to create a genuine issue of material fact. Plaintiff's claim is denied.

5. Plaintiff's Intentional Infliction of Emotional Distress Claim

To state a claim for intentional infliction of emotional distress (IIED), plaintiff must prove: (1) defendants intended to inflict severe emotional distress on plaintiff; (2) defendants' acts were the cause of plaintiff's severe emotional distress; and

(3) defendants' acts constituted an extraordinary transgression of the bounds of socially tolerable conduct. Babick v. Oregon Arena Corp., 333 Or. 401, 411, 40 P.3d 1059 (2002). Plaintiff alleges that defendants filed a series of false reports, which triggered an investigation by the CDIU. Plaintiff, however, offers no evidence in support of this allegation beyond his bare assertion. Moreover, to find that defendants' acts were an extraordinary transgression, the conduct must be deliberate and the means of inflicting the harm must be extraordinary. Shay v. Paulson, 131 Or. App. 270, 273, 884 P.2d 870 (1994). Even if plaintiff offered evidence that defendants provided information to the CDIU with the intent to cause him severe emotional distress, the means of inflicting that harm cannot be considered extraordinary. Finding no genuine issue of material fact, plaintiff's claim is denied.

CONCLUSION

Defendants' motion for summary judgment (doc. 17) is granted and this case is dismissed. All pending motions are denied as moot.

IT IS SO ORDERED.

Dated this 29 day of January 2009.

/s/ Ann Aiken
Ann Aiken
United States District Judge

